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No. 633

Supreme Court of the United States

October Term, 1959

ALBERT SAMUEL WRIGHT,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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I. Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled cause on the 21st day of October, 1959.

II. CITATIONS TO OPINIONS BELOW.

Neither the Supreme Court of Ohio nor the Court of Appeals of the First Appellate District of Ohio, nor the Court of Common Pleas of Hamilton County, Ohio, wrote any opinion in this cause.

III. JURISDICTION OF THIS HONORABLE COURT TO GRANT THIS PETITION.

The judgment of the Supreme Court of Ohio was entered on October 7, 1959; re-hearing was denied on October

21, 1959. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. Section 1257 (3), Rule 23 (1) (F) of the Rules of this Honorable Court.

IV. HOW FEDERAL QUESTION IS PRESENTED.

The Federal question was raised by the refusal of the trial court (see appendix page 5) to allow counsel for the petitioner to cross-examine one of respondent's witnesses during the presentation of respondent's case in chief, as to a material element of the offense for which petitioner was tried and convicted. By state law, petitioner could not have been convicted of the offense for which he was tried unless this element of the offense was proven by respondent beyond a reasonable doubt.

V. STATUTE INVOLVED

Section 2907.11, Revised Code of Ohio.

> "No person shall have or keep in his possession, tools, implements, or other things used by burglars for housebreaking, forcing doors, windows, locks, or buildings, or other places where goods, wares, merchandise, or money are kept with the intention of using such implements or tools burglariously.
> Whoever violates this section shall be imprisoned not less than one nor more than five years."

VI. QUESTION PRESENTED.

Can a state, consistent with *Salsburg* v. *Maryland*, 346 U. S. 545, and *Smith* v. *California*, 28 L. W. 4033, Dec. 14, 1959, in the trial of a criminal case in a state court in which intent, by the law of that state, is an essential element of the offense, establish rules of evidence, that suppress competent evidence on the question of that intent, regardless of how said evidence is obtained?

VII. STATEMENT OF THE CASE.

Petitioner was convicted in the Court of Common Pleas of Hamilton County (after a trial by jury had been waived) of possession of burglary tools with the intention of using them burglariously. From his sentence of imprisonment of from one to five years in the Ohio Penitentiary, petitioner appealed to the Court of Appeals for Hamilton County, Ohio, and to the Supreme Court of Ohio, alleging and contending in all of said appeals that his federal constitutional rights had been violated.

From the affirmance of his conviction, petitioner is now asking this Honorable Court to grant a petition for a Writ of Certiorari to the Supreme Court of Ohio.

Here is how the federal question was raised in the trial court (Under Section 2907.11 of the Revised Code of Ohio; intent is an essential element of the offense, *Baldwin* v. *The State*, 132 O.S., 302, *State* v. *Cimpritz*, 93 O.A., 407, 51 O.O., 173): on Page 95 of the Bill of Exceptions the following occurred at the trial on cross-examination by appellant's counsel of a witness called by the respondent while respondent was presenting its case in chief.

> "Q. You will pardon me just a moment? Have you, Lieutenant, any evidence to offer this Court that following, as of September 5, 1955, that Samuel Wright intended to use these tools in a burglary?
>
> Mr. Schoettmer: Objection.
>
> The Court: I will sustain the objection.
>
> Mr. Hopkins: (Attorney for petitioner in the trial). Exception. I have no further questions of this witness at this trial."

Petitioner urges that the refusal of the trial court to permit him to offer this evidence, or at the very least, to find out if there was any such evidence, prevented him from having a fair trial and denied to him procedural due process of law.

VIII. REASONS FOR GRANTING THE WRIT.

1. Rules of Evidence are procedural. *Salsburg* v. *Maryland*, 346 U.S., 545, *Smith* v. *California*, 28 L.W., 4033.

2. The due process of the Fourteenth Amendment does not prevent the introduction of evidence in a criminal case in a state court of evidence illegally obtained. *Wolfe* v. *Colorado*, 338 U.S., 25.

3. Any evidence bearing upon an essential element of an offense in a state criminal case — evidence that is not improper per se, such as hearsay, must be admitted. Otherwise the principle of fundamental fairness of a trial is flagrantly disregarded. *Salsburg* v. *Maryland*, 346 U.S., 545, *Wolfe* v. *Colorado*, 338 U.S., 25, *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S., 285 at 295, *U. S.* v. *Matol*, 146 Fed. (2nd) 197. See also concurring opinion of Mr. Justice Frankfurter in *Smith* v. *California*, 28 L.W., 4033, 4037, and concurring in part and dissenting in part opinion of Mr. Justice Harlan, *Smith* v. *California*, 28 L.W. 4033, 4040 for the need of fluidity and liberality in the allowance of evidence bearing on the question of scienter in criminal cases, scienter and intent being virtually synonymous.

IX. CONCLUSION.

For the foregoing reasons, this Petition For A Writ of Certiorari to the Supreme Court of Ohio should be granted.

All of which is respectfully submitted by

MELVIN EDWARD SCHAENGOLD
Attorney for Petitioner

WILLIAM F. HOPKINS, Esq.,
HARVEY B. WOODS, Esq.,
of Counsel.

APPENDIX

HOW FEDERAL QUESTION WAS RAISED AT THE TRIAL COURT.

Bill of Exceptions, Court of Common Pleas, Hamilton County, Ohio, State of Ohio v. Albert S. Wright, Criminal Number 70040.

Page 95:

On cross-examination by William F. Hopkins, Esq., Attorney for Petitioner, of a witness for respondent during the presentation, in chief, of the respondent's case.

"Q. You will pardon me just a moment? Have you, Lieutenant, any evidence to offer this Court that following, as of September 9, 1955, that Samuel Wright intended to use these tools in a burglary?

Mr. Schoettmer: Objection.

The Court: I will sustain the objection.

Mr. Hopkins: Exception. I have no further questions of this witness at this time.